I N D E X

	Page
TABLE OF CITATIONS ----------	i
ARGUMENT	
I ----------	1
II ----------	4
III ----------	5
CONCLUSION ----------	6
CERTIFICATE OF SERVICE ----------	8

TABLE OF CITATIONS - Page 1

STATUTES:

	Page
United States Code Title 28, §2281	5,6
United States Code Title 28, §1341	1

CASES:

Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970)	6
Autokefalos Orthodox Spiritual Church of St. George, The Tropoephoros v. Hallahan, 103 F.Supp. 389 (1952)	5
Boone v. Wyman, 295 F.Supp. 1143, affirmed 412 F.2d 857 cert. denied 90 S.Ct. 600, 396 U.S. 1024	6
Brown v. Chastain, 416 F.2d 1012 (1969)	2
Bussie v. Long, 254 F.Supp. 797 (1966)	6
Davis v. Adams, 315 F.Supp. 1293 (1970)	2,5
Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 325	3,5
Earl Faircloth v. Mr. Boston Distiller Corp., 245 So.2d 240 (1970)	2,3
Eitel v. Faircloth, 311 F.Supp. 1160 (1970)	3

TABLE OF CITATIONS - Page 2

CASES:

	Page
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.440 (1964) ----	4
Ex Parte Poresky, 290 U.S. 30, 54 S.Ct. 3 (1933) ----------	6
Fremed v. Johnson, 311 F.Supp. 116 (1970) ----------	6
NAACP v. Button, 371 U.S. 415 (1963) ----------	4
Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969) ---------	5
Pederson v. Breier, 327 F.Supp. 1382 (1971) ----------	6
Pilkinton v. Pilkinton, 389 F.2d 32 ----------	3
Rakes v. Coleman, 318 F.Supp. 181 (1970) ----------	6
Rooker v. Fidelity Trust Co., 263 U.S. 413, 445 S.Ct. 149; 68 L.Ed. 362 (1923) ----------	3,5
Sweeten v. Sneedon, 324 F.Supp. 1094 (1971) ----------	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO.

MR. BOSTON DISTILLER CORP. and CONSOLIDATED DISTRIBUTORS OF TAMPA, INC.,

Petitioners,

-vs-

RICHARD A. PALLOT, JACK C. DEMETREE, NELSON A. ITALIANO, B. W. SIMPKINS, and J. H. BAROCO, as members of and constituting the BOARD OF BUSINESS REGULATION of the State of Florida,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I

CAN THE ABSTENTION DOCTRINE BE APPLIED TO A CASE TO WHICH THE TAX INJUNCTION ACT, TITLE 28 USC, §1341 APPLIES TO DENY JURISDICTION IN A FEDERAL DISTRICT COURT TO PASS UPON FEDERAL CONSTITUTIONAL RIGHTS AFTER STATE COURTS HAVE DENIED RELIEF?

Petitioner has voluntarily and without reservation submitted the same federal constitutional question to the state courts of Florida, as was presented to the federal district court, and such question was finally determined on the merits by the Florida Supreme Court. Earl Faircloth v. Mr. Boston Distiller Corp., 245 So.2d 240 (1970). Petitioner did not seek review of said decision by the United States Supreme Court.

In Davis v. Adams, 315 F. Supp. 1293 (1970), an injunctive action was brought in the Federal District Court after a State Supreme Court had reached a final decision on the merits. The Federal District Court held that it had no jurisdiction to directly review a final determination of a federal constitutional question voluntarily submitted to and decided by the Supreme Court of Florida, regardless of whether review by the United States Supreme Court had been sought. Further, in Brown v. Chastain, 416 F.2d 1012 (1969) an action was brought in Federal Court seeking a mandatory injunction requiring the State to provide a free transcript for a civil appeal from a state court, involving a claim that denial of the transcript violated Plaintiff's constitutional rights. The Court held that it had no jurisdiction to directly review a final determination of a federal constitutional question, voluntarily submitted to and decided by state courts in state court litigation and with respect to which no review by the United States Supreme Court has been sought.

The Petitioners are simply attempting to re-litigate their federal constitutional claims which were litigated and determined in the state courts. The present proceeding is

obviously an afterthought as evidenced by the time span which has lapsed after the decision of the State Supreme Court on the same issues presented by the Petitioners in the case sub judice. The effect of the Petitioners' suit for injunctive and declaratory relief in the federal district court was to seek review by said Court of the state court's decision on the merits in the case of Earl Faircloth v. Mr. Boston Distiller Corp., cited supra. The Federal District Court does not possess appellate jurisdiction over state courts. Rooker v. Fidelity Trust Co., 263 U.S. 413, 445 S.Ct. 149; 68 L.Ed. 362 (1923). As stated in Pilkinton v. Pilkinton, 389 F.2d 32 "... it is plainly evident that what appellant seeks in this original action is a review by the federal courts of the proceedings of the ... [Florida] state courts in the divorce action. Federal courts are without authority to function as an appellate arm of the state courts."

"State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts." Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 325.

To the same effect, see Eitel v. Faircloth, 311 F.Supp. 1160 (1970).

Petitioner sought relief in the state courts voluntarily and without reservation. Petitioner could have brought his original suit for declaratory and injunctive relief in the Federal District Court, and if it was there determined that the District Court did not have jurisdiction over the cause, for

whatever reason, the District Court could have then held the case in abeyance until after the Petitioner had exhausted his state remedies. The point is that in the cases that have been cited by the Petitioners, suit was brought first in Federal District Court and upon a determination by such court that it did not have the jurisdiction over the case, the court held the case in abeyance until after the state remedies had been exhausted. See also England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 440 (1964); NAACP v. Button, 371 U.S. 415 (1963).

In the case sub judice, the Petitioner made no such effort. Since the Petitioner did not make the initial attempt to have his federal constitutional question reviewed in the Federal District Court, the cases and propositions cited by Respondent are controlling and the Federal District Court was without jurisdiction to consider this cause.

II

CAN THE DOCTRINE OF RES JUDICATA BE APPLIED TO A SUIT WHERE THE PARTIES IN THE SUIT ON THE BASIS OF WHICH RES JUDICATA IS ASSERTED ARE NOT IDENTICAL TO THE PARTIES IN THE SUIT AT BAR?

In the present case, the constitutionality of the statute in question has been determined by the highest court of the State of Florida. The Petitioners sought to have the District Court convene a Three-Judge Court to exercise appellate review of a decision of the Florida Supreme Court. Under the circumstances as heretofore stated res judicata applies and prevents further

consideration by the federal courts. Autokefalos Orthodox Spiritual Church of St. George, The Tropeophoros v. Hallahan, 103 F. Supp. 389 (1952); Paul v. Dade County, 419 F. 2d 10 (5th Cir. 1969); Davis v. Adams, 315 F. Supp. 1293 (1970); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149; 68 L.Ed. 362 (1923); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 325.

III

CAN A SINGLE JUDGE OF A UNITED STATES DISTRICT COURT REFUSE TO REQUEST THE CONVENTION OF A THREE JUDGE DISTRICT COURT WHERE THERE IS NO QUESTION BUT THAT THE ALLEGATIONS OF THE COMPLAINT RAISE A SUBSTANTIAL QUESTION OF CONSTITUTIONALITY?

Title 28, §2281, United States Code, provides that an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute, shall not be granted by any District Court or judge thereof, upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three-judges. Petitioners contend, that pursuant to said section, the District Judge should have convened a Three-Judge Court to determine the question of jurisdiction.

The clear and obvious prohibition of §2281 is that a single District Judge may not rule on the unconstitutionality of a state statute, however, such section, as clearly, does not prohibit a District Judge from ruling on the threshold question of jurisdiction. Such section does not require, or even contemplate, that a Three-Judge Court be convened to

consider a question of jurisdiction. §2281 requires that a Three-Judge Court must be convened only to consider the question of the constitutionality of the state statute. Ex Parte Poresky, 290 U.S. 30, 54 S.Ct. 3 (1933).

Section 2281 must be narrowly read in light of burden of federal judiciary imposed by Three-Judge Courts. Pederson v. Breier, 327 F.Supp. 1382 (1971)

Section 2281 should not be construed liberally as a measure of broad social policy. It is a technical enactment to be applied as such, and the section must be applied only in that narrow range of cases when it is strictly called for, and must be strictly construed. Sweeten v. Sneedon, 324 F. Supp. 1094 (1971); Rakes v. Coleman, 318 F.Supp. 181 (1970); Fremed v. Johnson, 311 F.Supp. 1116 (1970); Bussie v. Long, 254 F. Supp. 797 (1966).

The principal concern prompting the enactment of §2281 was the power of one Federal Judge to enjoin operation or enforcement of a state statute. Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970). Clearly a single District Judge is not enjoining the operation or enforcement of a state statute when he rules that the District Court does not have jurisdiction. §2281 was not intended to apply to the question of jurisdiction (see also Boone v. Wyman, 295 F.Supp. 1143, affirmed 412 F.2d 857, cert. denied 90 S.Ct. 600, 396 U.S. 1024.

CONCLUSION

The constitutionality of the state statute in question was voluntarily submitted to the state courts for disposition. The Petitioner should not be allowed to ignore the adverse state decision and start all over again in the

Federal District Court. The United States District Judge correctly decided the threshold question of jurisdiction, and his order of dismissal should be affirmed together with the court decision of the Fifth Circuit Court of Appeals that said order of dismissal was proper.

A review on Writ of Certiorari is not a matter of right, but is of sound judicial discretion and should be granted only where there is special and important reasons therefor. Therefore, jurisdiction to review the judgments and decrees of court of appeals by certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision. Respondent respectfully suggests that Petitioner has not demonstrated any special or important reasons for this Court to issue its Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been mailed to GEORGE L. ONETT and SHALLE STEPHEN FINE, Attorneys for Petitioners, 1237 City National Bank Bldg., Miami, Florida, this _____day of April, 1973.

J. Riley Davis